



INDIGENOUS BAR ASSOCIATION IN CANADA

Position Paper on Bill C-3 – Gender Equity in Indian Registration Act

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INTRODUCTION

The Indigenous Bar Association in Canada (IBA) is a non-profit organization representing Indigenous peoples involved in the legal profession across Canada, including judges, lawyers, academics, and students-at-law. The IBA was established in 1988 as a successor to the Canadian Indian Lawyers' Association (CILA). The IBA relies on the voluntary contributions of its members and its goals and objectives include the following:

- i) establishing a nation-wide community of Indigenous lawyers;
- ii) providing ongoing education to its members with respect to principles rooted in Indigenous law;
- iii) providing a forum for the exchange of information and experiences of Indigenous lawyers, academics, and students; and
- iv) advancing legal and social justice for Indigenous peoples across Canada by engaging in law and policy reform.

The IBA continues to promote the recognition and respect for Indigenous laws, customs and traditions in carrying out all of its objectives.

ISSUE

In 1951 substantial amendments to the *Indian Act*¹ created a centralized register of all people eligible to be registered as Indians². Sections 11 and 12 of the 1951 *Indian Act* perpetuated the federal government's long-standing practice of enfranchisement, whereby Indian women lost Indian status if they married a non-Indian male. Also, section 12(i)(a)(iv) of the 1951 *Indian Act*

¹ *Indian Act*, R.S.C. 1985, c. I-6 [*Indian Act*].

² The term "Indian" is employed in the *Indian Act* and as such, the term "Indian" is only used in these submissions for the purposes of referencing the provisions contained within the *Indian Act*.

also established the “double mother” rule which dictated that an Indian born after 1951 would lose their Indian status at the age of 21 if their mother, and their paternal grandmother, both acquired Indian status by virtue of marrying an Indian male. This legislative scheme was discriminatory and was arduously opposed by Indigenous communities.

In response, the Parliament of Canada passed Bill C-31, *An Act to Amend the Indian Act*, on June 28, 1985. Sweeping changes were made by amending status, membership and other provisions within the 1951 *Indian Act*. For instance, Indians who had lost their status as a result of the “double mother” rule were reinstated under section 6(1)(c).

On the other hand, section 6 of the 1985 *Indian Act* gave rise to a new form of gender discrimination. Section 6(1)(a) stated that a person is entitled to be registered if “that person was registered or entitled to be registered immediately prior to April 17, 1985.”³ Thus, if a male status Indian had children with a non-status Indian female prior to 1985, those children were entitled to 6(1) status. If a female was enfranchised under the 1951 *Indian Act*, she was entitled to be reinstated under section 6(1)(c), however, if she had a child with a non-status partner prior to 1985, her child was only entitled to 6(2) status. An individual with 6(2) status cannot pass their status on to their children if the other parent is non-status Indian. As a result, in some circumstances females reinstated under section 6(1)(c) were unable to pass their status on to their grandchildren; in every case, Indian males who had children before 1985 could pass their status on to their grandchildren.

³ *Indian Act supra* note 1 at s. 6.

This situation was faced by Sharon McIvor in *McIvor v. Canada (McIvor)*⁴, where Ms. McIvor, an Indian woman reinstated under section 6(1)(c) of the 1985 *Indian Act*, sought a declaration of invalidity of sections 6(1) and 6(2) of the *Indian Act* due to the fact that they violated section 15 of the *Charter of Rights and Freedoms*. Ms. McIvor's son, Jacob Grismer, was born prior to 1985 and was recognized as a 6(2) Indian. Jacob had a child with a non-status Indian and as a result, Ms. McIvor's grandchild was unable to acquire status. As previously illustrated, males in Ms. McIvor's position had the ability to pass their status on to their grandchildren in all cases.

The British Columbia Supreme Court ("BCSC") Court held that section 6 of the *Indian Act* gave rise to differential treatment on the grounds of sex and ordered that the section be declared of no force and effect "only insofar, as it authorizes differential treatment of Indian men and Indian women born prior to April 17, 1985, and matrilineal and patrilineal descendants born prior to April 17, 1985, in the conferring of Indian status".⁵ The decision was appealed to the British Columbia Court of Appeal ("BCCA") in April of 2009. The BCCA allowed the appeal in part. While the BCCA agreed that certain registration provisions of the *Indian Act* are unconstitutional, the court focused solely on the impact of the "double mother" rule and how it promoted gender inequality under the 1985 *Indian Act*. The Court held that that Ms. McIvor was the recipient of an "enhanced status" under the 1985 *Indian Act* and that in order to remedy the discrimination experienced in her case, a number of provisions could be employed; the BCSC was not necessarily required to augment Jacob's position by granting him section 6(1) status. Therefore, the BCCA ordered that section 6 of the *Indian Act* be amended within 12 months – i.e. April 6, 2010. Parliament was granted an extension to January 31, 2011.

⁴ *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, [2007] B.C.J. No. 1259 (SC)(QL) [*McIvor*].

⁵ *McIvor supra* note 2 at 351.

Bill C-3 was introduced at first reading in the Senate on November 23, 2010 and was debated at second reading on November 25, 2010. This is a Bill to promote gender equality in Indian registration by responding to the BCCA decision in *McIvor*. If Bill C-3 receives Royal Assent in its current form, it will fail to address the legacy of colonial and assimilationist policies that can be traced to the earliest forms of the *Indian Act*.

While the IBA believes that Bill C-3 is a step towards addressing the gender discrimination inherent within the *Indian Act*, attention must be drawn to the fact that the amendments are a patchwork solution to the fundamentally flawed provisions dealing with status and citizenship in Indigenous communities. Bill C-3 does not address questions pertaining to citizenship, Indigenous jurisdiction and the long-term viability of the status system as a whole. Parliament has been afforded an opportunity to meaningfully recognize and implement systems of membership based on Indigenous legal traditions. By disregarding the opportunity to address their broader issues, the Crown is depriving Indigenous nations of their ability to exercise their aboriginal, treaty, and international rights to govern their own citizens.

THE DUTY TO CONSULT

The Supreme Court of Canada in *Haida v. British Columbia*⁶ made it clear that the Crown owes a duty to consult whenever it has “knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”⁷ While the Crown may invoke its authority under section 91(24) of the *Constitution Act, 1982* to legislate

⁶ *Haida v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70 (QL) [*Haida*].

⁷ *Ibid* at 35.

with respect to “Indians and Lands reserved for Indians”⁸, this power must be read together with section 35 of the *Constitution Act, 1982*.⁹ As such, the power to legislate with respect to First Nations is explicitly qualified by the need for adequate, meaningful consultation that is consistent with the honour of the Crown.

In this case, the amendments to the *Indian Act* trigger the honour of the Crown and the duty to consult. First, the Court in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*¹⁰ clearly held that while First Nations do not have a veto when they are being consulted, the Crown cannot act unilaterally when it makes decisions that potentially adversely affect Aboriginal interests.¹¹ Bill C-3 must be viewed against a backdrop of persistent unilateral legislative attempts to assimilate Indigenous populations. By perpetuating the paternalistic regime affected by the *Indian Act* and failing to acknowledge the rights of Indigenous nations to govern their own membership, the Crown is impairing their ability to meaningfully exercise such rights. This in turn clearly gives rise to a duty to consult.

Second, the right to determine membership according to traditional and historical practices is a fundamental right of every Nation. Indigenous nations in Canada have been repeatedly characterized by the court as “collective” entities. The rights that accrue to these bodies can only be exercised as a community; individuals cannot claim an aboriginal right. As such, prudent policy demands that these entities have a voice when legislative change fundamentally alters the terms dictating who belongs to these collective entities.

⁸ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 s. 91(24).

⁹ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*] at 62.

¹⁰ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71 (QL).

¹¹ *Ibid.*

FIRST NATIONS JURISDICTION OVER CITIZENSHIP

Indigenous nations across Canada have vehemently asserted that membership is a core area of self-government. These assertions are buttressed by major studies such as the 1983 Penner Report on Indian Self-Government in Canada and the 1995 Report of the Royal Commission on Aboriginal Peoples. Further, the right to determine membership was an integral component of the “pre-existing sovereignty”¹² historically exercised by Indigenous nations. It is beyond dispute that Indigenous nations in Canada traditionally exercised the right to determine their own membership and that this right is now firmly entrenched in section 35 of the *Constitution Act*, 1982. In the view of the IBA, the status system under the *Indian Act* is an unjustifiable infringement of the inherent right of Indigenous nations to determine their own membership. In light of these factors, it is clear that the over-arching injustice to Indigenous nations stems from the imposition of an unwelcome, beleaguered status system and that Bill C-3 circumvents this issue by adopting a narrow-sighted view of Indigenous citizenship.

While Bill C-3 aims to address gender discrimination effected by the *Indian Act*, the larger issue illustrated in *McIvor* is that the colonial mindset which laid the framework for the *Indian Act* has failed time and again to fulfill the needs of Indigenous nations. Since the inception of Indian status within the *Indian Act*, the Crown has repeatedly amended the same to include a complex set of criteria for determining who is and who is not an “Indian”. The limited relief offered by Bill C-3 is only the latest chapter in an ongoing effort by the Crown to undermine the ability of Indigenous communities to determine their own members.

¹² *Haida supra* note 6 at para. 20.

It is important to mention that Indian status cannot be confused with the system of band membership contained within sections 8 to 14 of the *Indian Act*. For instance, under Bill C-31, sections 8-14 were amended to permit bands to determine their own criteria for membership according to custom; however, the federal government retained the discretion to determine for status. As a result, the rights of status Indians (as opposed to “band members”) were segregated. Following Bill C-31, status Indians can access programs such as post-secondary funding, non-insured health benefits, and funding for housing. On the other hand, band members only have access to communal and political rights such as rights to live on reserve land, participate in elections, and access band assets. In *McIvor*, the BCSC made it clear that the designation of status and the right to receive corresponding benefits has become a powerful source of identity within Indigenous communities.¹³ As such, the power to determine band membership is trivial in the face of the Crown’s overwhelming power to dictate status designations in Indigenous communities.

The recognition of the right of Indigenous nations to exercise jurisdiction over membership is also consistent with Canada’s status as a multi-juridical state. Canada’s legal apparatus embraces common law, civil law and Indigenous legal traditions. For instance, the Supreme Court of Canada has stated that the common law has always recognized “the ancestral laws and customs of the aboriginal peoples who occupied the land prior to European settlement.”¹⁴ Renowned Indigenous legal scholar and IBA member, Dr. John Borrows, suggests that the multi-juridical platform is a strong basis to strengthen and unify the ties within Canada. With respect to Indigenous legal traditions, he states that the same can “have great force in people’s lives

¹³ *McIvor supra* note 4 at para. 133.

¹⁴ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (QL) at para. 263.

despite their lack of prominence in broader circles. Indigenous legal traditions are a reality in Canada and should be more effectively recognized.”¹⁵ At its most basic level, the right to determine citizenship is an expression of the values and traditions embedded in Indigenous legal traditions.

These sentiments were echoed by Sebastien Grammond, a Canadian scholar who points to the beneficiary provisions of the James Bay Northern Quebec Agreement (“JBNQA”) as an example of Indigenous autonomy in the area of membership. Grammond suggests that the principles embodied in sections 3A.3.1 of the JBNQA is recognition of the Inuit legal order as part of the composition of Canada’s legal institution. Grammond goes on to state that the criteria adopted for the purposes of determining who is and who is not Inuk:

... effectively emphasize the individual’s connection with the community, most notably when it is based on ancestry, residence in Nunavik, concern for the welfare of other beneficiaries (to be clear, sharing), and family and social connections. The criteria also encompass those factors which are traditionally seen by Western eyes as being “typical Inuit”, such as respect for the land and animals, and knowledge of Inuktitut. Furthermore, these criteria are to be applied by local communities entirely composed of Inuit, who are certainly better positioned than a bureaucrat, to determine if a person is a member of their community.¹⁶[Emphasis added]

The system for determining membership within the JBNQA, which emphasizes communal ties and participation, is a favourable approach which, in the view of the IBA, could be replicated in other Indigenous jurisdictions across Canada. This is consistent with commonly shared views of Indigenous peoples in Canada that race-based formulae, such as those instilled by Bill C-3,

¹⁵ John Borrows, *Canada’s Indigenous Constitution*, (Toronto: University of Toronto Press Incorporated, 2010) at 23 [Borrows].

¹⁶ Sébastien Grammond "L'appartenance aux communautés inuit du Nunavik: un cas de réception de l'ordre juridique inuit?", (2008) 23 Canadian Journal of Law and Society 93 at 117 [translated by author].

should be abolished. John Borrows argues that, “We should not deny people citizenship if they are willing to abide by First Nations citizenship laws and be fully participating members in our communities... Indigenous laws should flow from the political character of our societies; they should not apply because of society’s racialization of Indigenous peoples.”¹⁷ Until this point, it is clear that the current *Indian Act* has been the source of many grievances between status, non-status, on-reserve, and off-reserve Indigenous peoples. Such arbitrary, archaic distinctions need to be abandoned in favour of a more principled, community-based approach.

Finally, the Parliament of Canada formally endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”) on November 12, 2010. UNDRIP is a comprehensive document which sets internationally agreed upon standards for protecting the rights of Indigenous Peoples all over the world. Article 33.1 of UNDRIP states that “Indigenous Peoples have the right to determine their own identity or membership in accordance with their customs and traditions.” The recognition of Indigenous peoples’ right to govern their own membership in Canada is an important step to ensure compliance with UNDRIP.

A status system that undermines the legitimacy of band governments cannot be characterized as one that promotes the honour of the Crown. Deficiencies that plague the band membership and status systems severely offend the goals of reconciliation sought by s. 35 of the *Constitution Act, 1982* and UNDRIP. Also, it is likely that Indigenous nations could advance a strong argument that sections 6-14 of the *Indian Act* unjustifiably infringe their Aboriginal right to have and maintain societal relationships in accordance with traditional principles, laws, customs and practices, including the right to determine their own members. Thus, reactive, short-sighted

¹⁷ Borrows *supra* note 15 at 157.

remedial approaches to the *Indian Act*, such as those contained within Bill C-3, will only precipitate the injustice faced by Indigenous nations in Canada.

LEGISLATIVE REFORM

Bill C-31 introduced a formula outlining qualifications for Indian status in Canada which is preserved in Bill C-3. Sections 6(1) and 6(2) of the amended *Indian Act* created two distinct categories of Indians pursuant to the *Act*. “Full Blooded” Indians are alluded to in 6(1) while Indians with only one status parent would fall into the category outlined in 6(2). The distinction becomes important when one analyzes the effects of this provision on eligibility for registration. Effectively, only persons registered under s. 6(1) can pass their status on to their children. If children of a person registered under 6(2) are to be registered, the other parent must be registered under either s. 6(1) or 6(2). This creates a “two-parent” system, dictating which individuals can pass on their status and severely limiting status where non-status individuals become involved in the equation.

One of the most urgent concerns of First Nations people across Canada is the need for legislative reform to prevent vanishing status populations in some communities. If a status Indian in Canada wishes to pass on their status to their children, the *Indian Act* discourages any relationships with non-status society members because it reduces the resulting children’s ability to inherit status. If a 6(1) status Indian decides to have children with a non-status individual, their legacy may be that their status may fail to pass to their grandchildren. If a person of 6(2) status wishes to have children with a non-status individual, their status will not pass to their children or grandchildren at all.

The rapid influx of status Indians to urban communities has had the effect of reducing the status Indian population as a whole. Any on-reserve status Indians who enter relationships with people outside of their own communities will forfeit their children's ability to pass on that status. This will inevitably produce a legislated extinction of status communities. It is beyond dispute that the *Indian Act* was predicated on a platform of assimilation and integration. Against this historical backdrop, it is clear that a legislative regime that systematically reduces the number of First Nations peoples in Canada without their consent will only prolong this antiquated platform of assimilation.

The status quo continues to perpetuate inequality within First Nation families. Families may have members that are registered as 6(1) or 6(2) or as non-Status Indians. Regardless if they are a family under the same household and if their community recognizes them as deserving citizens their Indian status is still legally defined by the *Indian Act*. This hinders their access to programs and services in their community. Funding to First Nations is allocated by the amount of registered band members not by the actual amount of population.

RECOMMENDATIONS:

- 1. The IBA recommends that the federal government of Canada move away from defining "Indians", to supporting an approach that recognizes First Nations' jurisdiction to determine citizenship**

The federal government's ongoing interference in First Nation jurisdiction through the determination of who can be registered as an Indian under the *Indian Act* arguably contravenes s.35 of the *Constitution Act*, 1982. It is not palatable for the federal government acting on behalf

of Canada to continue to interfere in this core area of First Nation jurisdiction. Moreover, the federal government's continued insistence to interfere with First Nation jurisdiction to determine First Nation membership is inconsistent with international norms. The fact that these legislative sections still exist, are inconsistent with current international conventions, most notably Article 33.1 of the United Nations Declaration on the Rights of Indigenous Peoples which reads:

Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.¹⁸

2. The IBA recommends that Canada establish another Special Parliamentary Committee to act as a Parliamentary Task Force on the broader issue of self-government, membership and citizenship in conjunction with sections 6-14 of the *Indian Act*.

Previously, CILA had provided recommendations to the Penner Committee on Indian Self-government in Canada which addressed important related issues like membership and citizenship. One recommendation made by CILA (adopted by the Penner Committee) was that

¹⁸ See also: **Article 4, 9, 18, 19.**

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

constitutional change was not required to implement self-government. The federal government was already in a position to take the broader steps necessary. CILA recommended:

Under Section 91(24) of the Constitution Act, 1867...the federal government is given exclusive jurisdiction over Indians and Indian lands. This means that the federal government has the power to pass legislation with respect to Indians and Indian lands without respect to the provinces. This is well illustrated in the Indian Act, which deals with areas that are within provincial jurisdiction. Areas such as wills and estates, motor vehicles, marriage, property, creditors' rights, and liquor are all included in the Act. It can therefore be concluded that the federal government has the authority to legislate in all respects of Indians dealing with an area under Section 92 of the Constitution Act, 1867.¹⁹

We understand that the Assembly of First Nations has also made this recommendation to this Committee. Given our conclusion that the scope of Bill C-3 does little to address the broader important issues, we recommend that you include such a recommendation to Parliament.

- 3. With respect to Bill itself, the IBA agrees with the CBA, that section 9 be removed from Bill C-3.**

REFERENCES

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¹⁹ House of Commons, Special Committee on Indian Self-Government, Second Report to the House, October 20, 1983, p. 59

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